

Minutes in Form of Issues List

(Based on Partition Task Force Meeting of July 14, 2017, per JWW; **for revision by attendees**)

Attendance: Judith Welch Wegner, Co-Chair; Starkey Sharp, Co-Chair; Faith Rivers James; Paul Stam; C. Thomas Steele, Jr.; Bly Hall; David C. Unwin; Joshua Lanier, North Carolina Bar Association.

Today's Goal: Identify wide range of issues and create list of issues to be considered after additional research.

Issues Raised With Sufficient Interest to Revisit. Preliminary pooling of ideas; members asked to clarify as needed; staff to refine/clarify based on their expertise; first part of next meeting to be spent working through clarifying, clustering, and sequencing issues as part of extended agenda for the next several months.

1. Procedural issues:

- a. Notice (particularly as to situations with unknown heirs; and that may not only be in defined "heirs property" situations)
 - i. Electronic means:
 - 1) Websites? (recent pilot legislation)
 - a) State-level posting? Where and how?
 - b) Electronic posting may be needed for other types of situations (e.g. foreclosures with unknown heirs?); notice to creditors in estates context?
 - c) Other
 - 2) Should this question be posted to Uniform Laws Commission for national working group?
 - ii. Incentives/requirements that might help assure better notice to distant owners?
 - 1) Signs on property for community notice
 - 2) Tax bills: generally only sent to one owner; create incentive for taxpaying owner to share information with distant co-tenants in order to allow them to later assert claim re "presumption against ouster among co-owners" and possible adverse possession claims?
- b. Guardian ad litem role in representation of unknown heirs (may not only be as to partition; could be in other circumstances? Suggests that may need to do research to capture full range of situations with unknown/unidentifiable heirs and how to handle their situations)
- c. Commissioners:
 - i. Not always needed? When needed?
 - ii. Fees: Should they receive % of property value? What cap? Alternative fee structure?
- d. Attorneys' fees:
 - i. "Common benefit" standard: does it need to be clarified?
 - ii. Should ethics opinion standards be reflected in statutes?
- e. Costs in partition actions (or similar):

- i. What are they? Attorneys' fees; commissioners; costs of sales; surveys; genealogy research; appraisal?
 - ii. Who pays and when? Impose on petitioner, all or some? When impose (can payment on some of these early costs be confirmed as payable but not be paid for 6 months?)
 - iii. Particular questions re use of appraisals or requirement of appraisals (per Uniform Partition of Heirs Property Act)
 - 1) Costs of appraisals and who pays? Shouldn't be forced on those not initiating?
 - 2) How exact are appraisals (within some range, so not exact)?
 - 3) How does appraisal system work within context of Uniform Act or otherwise?
 - a) Parties can decide to agreed value; or use agreed realtor
 - b) How to handle up-front costs of appraisers?
 - c) **[amended]** Would it be possible to get appraisal board to permit appraisals on a contingency in partitions, or in partitions where the value is under a certain amount?
 - 4) Appraisals for example in estate situations
 - a) Would appraisal be in the file and available to bidders?
 - b) If so, would valuation undercut/squelch bidding?
 - iv. Is there a way to reduce costs for partition actions when property value is below a certain threshold?
 - f. Court findings in partition actions in order to limit potential for future litigation?
 - i. E.g. partition in kind is not feasible (after pleading but without requiring proof when obvious in some circumstances?)
 - ii. Key questions for unknown heirs or unlocatable heirs: (a) sell or not; (b) in kind or not; (c) value: court findings should address these explicitly
 - g. Joinder of spouses in partition proceedings (particularly when dealing with unknown heirs) in order to defeat potential inchoate interest claims
 - i. Give notice to spouses if known; but otherwise don't need to join spouses
 - h. Court orders:
 - i. Order to allow sale to be automatic in connection with orders re partition
 - i. Relation among varying statutory provisions so that all are coordinated and work together: be sure that consistent and integrated
 - i. Regular partition
 - ii. Sales: judicial and execution sales
 - iii. Rules of Civil Procedure
 - iv. Quiet title actions
 - v. Other
2. Issues relating to relations among co-tenants:
- a. Presumption against ouster among co-tenants (case law) and appropriate understandings of quasi-fiduciary relationship:
 - i. When should presumption against "ouster" apply and for how long?

- ii. What standard should be used as to notice of “ouster” to move beyond presumption?
 - iii. Does filing of partition suit amount to “ouster” as to unknown heirs?
 - iv. What statute of limitations should apply if there is “ouster” by filing partition action, and what notice is required? (perhaps 7 year statute for color of title)
 - b. Adverse possession doctrine more generally and how it applies?
 - c. Carrying costs:
 - i. Expand statutory content to address not only taxes but also insurance, mortgage, other carrying costs?
 - ii. Think through issues about situations in which tenant in possession pays carrying costs:
 - 1) National case law says that if tenant in possession seeks reimbursement of carrying costs, such costs should be offset against value of possession?
 - iii. Other issues re carrying costs:
 - 1) Should tenants paying taxes and other costs be required to notify co-tenants that they are doing so and possible consequences?
 - 2) Is there need for any intermediate option for those paying carrying costs to demand contribution from co-tenants not in possession?
 - 3) Is there any possibility that requiring notice to be given to tenants not in possession would foster more amicable future resolution re carrying costs or ultimately partition?
 - 4) Would it be possible to develop a statutory short-form co-tenant agreement that would facilitate clear understandings early-on among co-tenants about financial and possessory rights?
 - iv. Importance of clarity re carrying costs:
 - 1) Interest rates? 8 % or less?
 - 2) Statute of limitations? 10 years or more?
 - 3) What if living on the property?
 - d. Issues arising when developer/unrelated party purchaser acquires a fractional share:
 - i. “Credit bid”: partition per judicial foreclosure (Article 29A of Chapter 1) allows party making such a bid credit for own interest
 - ii. Waiting period for unrelated purchaser who acquires fractional interest to force partition? Possible due process or equal protection issues?
3. Tax issues:
- a. Federal IRS policies have historically discounted value of fragmented property interests: when, what circumstances?
 - b. Local property taxes and reimbursement of parties who pay them (for co-tenants)
 - i. 80% of counties will not accept deeds if taxes not current: implications?
 - ii. Interest rates on back taxes: 8% too high
 - iii. Statute of limitations: 10 years? But not consistently recognized?
 - iv. Review earlier questions: pay taxes but offset by value of occupancy?
 - c. Reduced tax value for farm and forestry property per use tax provisions

- i. Do co-tenants know about this option and how to proceed?
 - ii. How to facilitate/link/explain these options for those involved in rural “heirs property” ownership?
 - d. Treatment of voluntary partition situations
 - i. Are such situations “taxable events” per state and/or federal law?
 - ii. Are there ways to avoid tax consequences if value reinvested in property?
 - e. Medicaid eligibility
 - i. How are partition sales treated for Medicaid eligibility? “House” ownership is exempt, but what are other possible issues affecting the elderly?
 - ii. Other
- 4. Other issues: costs v. value of property in partition
 - a. Timber/mineral sales (Sen. McInnis):
 - i. (per Starkey): Issues really concerns whether
 - 1) more value if timbering occurs first, and then partition of underlying land OR
 - 2) more value if partition first, before timbering
 - b. Possible approach to simplify certain partitions when property of limited value (under \$XXX?)
 - c. Also evident that many lay people do not understand concurrent ownership and partition issues (and task force may or may not want to try to address this issue; might do so in structure of statutes?)
 - i. Majority rule?
 - ii. Elders rule?
 - iii. Those who pay taxes rule?
 - iv. Other similar issues:
 - 1) Importance for the rule of law that lay people understand
 - 2) Might bear on clarity of explanations and structure of statutes?
- 5. Heirs Property (Uniform Act)
 - a. Definition of “heirs property” (need to be clear what proportion of partitions are affected)
 - b. Appraisals protocols as means of facilitating agreement (who pays, what circumstances)
 - c. Choice of “in kind” versus “partition by sale”:
 - i. Role of emotional/ subjective interests versus economic interests
 - ii. Continue presumption in favor of “in kind” partition
 - d. Strategies for expedited decision-making from Uniform Act to be made available more generally by choice in non-“heirs property” situations for efficiency and cost-savings?

Staff additions (issues also discussed):

- No apparent interest in virtual representation as in the trust code in lieu of guardians ad litem.
- Allow issuance of a writ of possession in the partition proceeding where the partition is in kind (eliminate need to file a separate proceeding)
- Mechanism to allow real estate agent to show property during open-market sale process
- Torrens system, pros (security fund) and cons
- Center to help with costs associated with appraisal, genealogical research, etc.

Paul Stam also orally shared the following post-meeting on 07/31/17. There is some duplication with the list above, some elaboration, and some new items. As memorialized by staff:ⁱ

- (1) Authorize the clerk to issue a writ of possession.
- (2) Treat partition sales like 1031/1033 nontaxable exchanges—any way to affect federal tax treatment? Direct Secretary of Revenue to adopt rules.
- (3) In a partition of a residential property, a clerk can order, upon motion, that the occupants must allow real estate agent to show the house.
- (4) In a partition proceeding, the petitioner does not have to join or notice spouses of heirs because their interests are inchoate and remote.
- (5) Presumption that attorneys' fees incurred for the common benefit should be awarded.
- (6) Clerk shall allow cotenant to be reimbursed for property taxes paid during the past 10 years at the legal rate of interest.
- (7) Electronic notice—too big and controversial? See HB 205.
- (8) Tax bills can be sent to more than one person; send copies to anyone listed on the property who gives an email address—no additional cost.
- (9) Codify, but do not change, current law on ouster. 7 years is too short. Perhaps 20 years after cotenant doesn't do anything relating to the property.
- (10) Sole occupant doesn't have to pay rent but does not get reimbursed for carrying costs, unless those carrying costs exceed the reasonable rent, like if there is a mortgage.
- (11) Optional statutory short-form tenancy-in-common agreement; some elements: if one person occupies the property, the occupation will be treated as a debit, but if the person pays carrying costs, the carrying costs will be treated as a credit; no one will file partition for at least X years.
- (12) Uncodified language—Commissioner of Agriculture or Association of Assessing Officers should do an outreach program to notify property owners of option to defer property taxes.
- (13) Attorney can serve as commissioner—look at ethics opinion.

ⁱ Any errors are ours.